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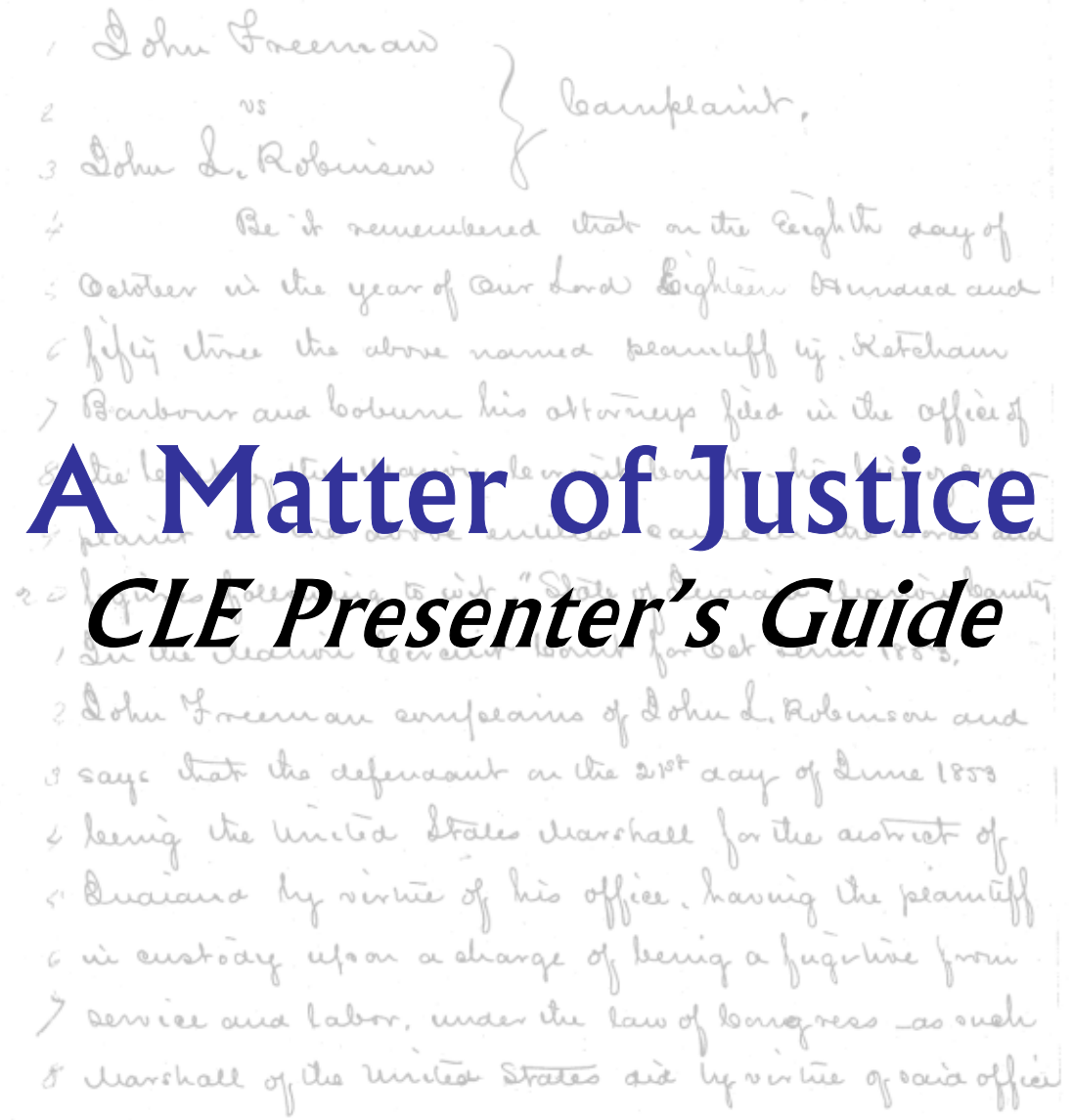

A Matter of Justice

CLE Presenter's Guide

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A Matter of Justice
Discussion Guide

GENERAL BACKGROUND

Northwest Ordinance

1787 Ordinance: http://www.statelib.lib.in.us/www/ihb/resources/docnword.html
Timeline of Events: http://www.statelib.lib.in.us/www/ihb/resources/tlnword.html

The Confederation Congress enacted the Ordinance of 1787 at the same time that delegates were working in Philadelphia on a new document for governing the United States. The Ordinances are generally considered one of the few successes of the short-lived Confederation Congress. Another, of course, is their successful waging of the Revolutionary War and its conclusion with the Treaty of Paris.

Indiana was formed from the territory declared by Congress as the Northwest Territory. In 1787 Congress passed one in a series of ordinances relating to this land and its relationship to the newly established United States of America. The Ordinance of 1787 (along with those passed before 1787) provided:

- for the formation of three to five states from this land;
- that a section in each township be set aside for public education;
- that when the population reached 5,000 male voters a territorial legislature could be established and when the population reached 60,000 the territory would be eligible for statehood;
- that each new state was admitted to the Union on equal footing with all other states; and
- that slavery and indentured servitude were expressly prohibited.

Why in 1787 was Congress able to include the last provision? Remember, it was passed while the "new" constitution was still under construction, therefore pre-dating that Convention's compromises regarding slavery. Historians generally point to three reasons as to why southern states agreed to this prohibition in the ordinance:

1. In 1787 the ideals of the Revolution were still very powerful and seemingly within grasp;
2. Most educated Americans believed that slavery was a dying institution and would fade away on its own; and
3. Southerners didn't think the land was suited to slave-based agriculture.

There were, of course, settlers in Indiana long before the Ordinance of 1787 went into effect. Most of these residents came from southern states and French-held territory. They settled around the Ohio River and, some brought slaves with them. One way to avoid freeing one's slaves was through the establishment of some variety of apprenticeship. Feelings were so strong on this topic, especially in the region around Vincennes, that in 1806 the Territorial legislature petitioned Congress to suspend this provision of the Ordinance. Congress declined to do so.

1816 Constitution

Constitution of 1816: http://www.statelib.lib.in.us/www/ihb/resources/doconst1816.html
Journal of the Convention: http://www.statelib.lib.in.us/www/ihb/resources/convjournalone.html
Members of the Convention:
http://www.statelib.lib.in.us/www/ihb/resources/convmembers1816.html

The 1816 Indiana Constitution once again affirmed the prohibitions articulated by the Ordinance of 1787 against slavery and indentured servitude. This does not mean, however, that the prohibition received universal support. In Vincennes, for example, the Marshal's 1830 census still included twelve "Slave males" and twenty "Slave females."

In 1823, only a few years after statehood, there were rumblings about calling a new constitutional convention. Many observers believed that the repeal of the prohibition on slavery and indentured servitude was a primary goal of those who wanted a new constitutional convention despite the prohibition in Article VIII § 1 of the 1816 Constitution:

> But, as the holding [of] any part of the human Creation in slavery, or involuntary servitude, can only originate in usurpation and tyranny, no alteration of this constitution shall ever take place so as to introduce slavery or involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted.

Between 1816 and 1850 calls for a constitutional convention were presented to Indiana voters five times and there were fourteen additional attempts that failed to make it out of the legislature. None of these efforts were successful until 1849.

Indiana Court Cases*

Under the 1816 Constitution, the Indiana Supreme Court was generally very supportive and protective of the rights of blacks.

State v. Lasselle, 1 Blackf. 59 (1820)

General Hyacinth Lasselle was one of Vincennes' most prominent citizens. He commanded Fort Harrison for a time during the War of 1812, owned Vincennes' largest hotel, married the daughter of a well-connected French family, and raised a family of ten children.

In 1820 two antislavery advocates organized a relatively friendly lawsuit to test the validity of slave ownership in light of Indiana's new constitution. The suit sought freedom for a woman known only as Polly, the daughter of a slave Lasselle had purchased from Native Americans in

* The text provided for each Indiana case is excerpted from a forthcoming article, written by Chief Justice Randall T. Shepard, in *Traces* magazine: "For Human Rights: Slave Cases and the Indiana Supreme Court."

the territory northwest of the Ohio River before Virginia ceded it to the federal government and, obviously, long before Indiana entered the Union. The Circuit Court of Knox County, sitting in Vincennes, ruled in favor of Lasselle and remanded Polly to his custody, ruling: "[A]s far as it regards the situation of the mother of the present applicant, this is now a slave state." The trial court's statement likely resonated with the substantial part of southern Indiana's population that held views favorable to the institution of slavery.

Polly's lawyers appealed. The Indiana Supreme Court set her free, observing, "the framers of our constitution intended a total and entire prohibition of slavery in this State; and we can conceive of no form of words in which that intention could have been more clearly expressed." The Court also awarded Polly $26.12 in costs for her trouble.

In re Clark, 1 Blackf. 122 (1821)

Where legal prohibitions against slavery held firm, as they did in the Lasselle case, indentures of servitude were a common tool by which slave owners attempted to retain their servants. In another case from Knox County, G. W. Johnson of Vincennes executed just such an indenture with Mary Clark a few weeks before the 1816 Constitution took effect.

The 1816 Constitution included a provision on servitude invalidating any indenture made after the date of statehood "outside the bounds of the state." Johnson's contract of indenture with Clark, however, was not covered by the literal terms of this provision.

Judge Jesse Holman, who moved to Indiana from Kentucky in 1810 in large part to free the slaves he and his wife inherited from her father, authored the Court's opinion in the Clark case. He observed that the constitution took great pains to establish rights for former slaves and declared that commanding performance of indentures was utterly inconsistent with those provisions. He wrote: "[S]uch a performance, if enforced by law, would produce a state of servitude as degrading and demoralizing in its consequences as a state of absolute slavery; and if enforced under a government like ours, which acknowledges personal equality, it would be productive of a state of feelings more discordant and irritating then slavery itself." The Supreme Court ordered Clark discharged.

Baptiste v. State, 5 Blackf. 283 (1840)

George D. Baptiste was a mulatto who had not given bond as demanded by the overseers of the poor, local officers charged with assisting or corralling people deemed vagrant. The $500 bond requirement was enacted by the General Assembly in 1831.

While the Indiana Supreme Court upheld this statute, it did so in the most reluctant of tones, saying that the law was "not so clearly repugnant to the constitution as to authorize us to pronounce it a nullity."

That the statute was constitutional did not mean it would be lovingly enforced. The Court reversed a trial-court order directing that Baptiste be removed from the state. One might say the justices "fly-specked" the statute nearly to death. They observed that the law did not require removal if the defendant gives no bond; rather, it permitted the overseers the choice of hiring out the vagrant to work *or* removing him to his state of origin. Moreover, if the overseers elected

removal as the remedy, the Supreme Court ruled, the circuit court could issue such an order but not direct a justice of the peace to do so. Besides, the Court added, the original application failed to specify where Baptiste had last been a legal resident and thus the application was procedurally deficient from its beginning.

Federal Court Case*

Prigg v. Pennsylvania, 41 U.S. 539 (1842)

http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=41&invol=539

The U.S. Supreme Court, led by Chief Justice Roger Taney, struck down a Pennsylvania law that prohibited the recapture and return of fugitive slaves. It held that the federal government possessed exclusive jurisdiction in dealing with runaway slaves—jurisdiction that the states could not invade.

Compromise of 1850

http://www.yale.edu/lawweb/avalon/fugitive.htm

One of the provisions of the Compromise of 1850 included a stronger federal fugitive slave law. Other provisions included the admission of California to the Union, issues related to Texas' border and the debt from the Mexican war, the organization of the Utah and New Mexico Territories, and the abolition of the slave trade in Washington D.C. After almost a year of political turmoil, the Compromise was achieved, but only because each of the five provisions was voted on separately.

The fugitive slave provision of the compromise touched off a firestorm of opposition in many northern states. Many northerners were outraged by the law's very vague requirements for identifying runaway slaves. Furthermore, the law authorized the use of federal marshals to help apprehend and return fugitive slaves. Indeed, Harriet Beecher Stowe credits her revulsion toward this law as the motivating factor for writing *Uncle Tom's Cabin*.

In Indiana, the members of the 1850 constitutional convention spent several days in a heated debate about whether or not they should send a resolution to Congress about the "compromise measures." Many members thought it was an inappropriate topic for consideration by a constitutional convention. Others expressed extreme outrage about the measures, especially the fugitive slave component; and, some were outspoken in their support for the bill and the institution of slavery. Eventually the convention resolved:

> That, not withstanding our personal opinion as to the propriety or impropriety of the recent measures of Congress, they should be submitted to, so long as they exist as laws, as the supremacy of the laws is the only means of preserving our government from anarchy and destruction; and that we disapprove of any attempts, by force or violence, to resist the execution of the laws. (*Journal of the Convention*, December 2, 1850)

*The text provided for each Indiana case is excerpted from a forthcoming article, written by Chief Justice Randall T. Shepard, in *Traces* magazine: "For Human Rights: Slave Cases and the Indiana Supreme Court."

1851 Constitution

http://www.statelib.lib.in.us/www/ihb/resources/1851doconst.html

While issues of race were not a part of the call for a new constitutional convention, as noted above in the discussion of the Compromise of 1850, it became a major component of the proceedings.

The primary reasons for calling a convention focused on expenses related to annual sessions of the legislature (this included all the time the General Assembly spent on local and special legislation and the constitutional requirement for the legislature to conduct impeachment proceedings for local officials) and the desire to create more popularly elected offices.

Extension of the franchise to "native and naturalized" citizens was also a hotly debated topic. While women and the franchise are not addressed in the new constitution, Article II § 5 does expressly prohibit blacks from voting. In addition, the new constitution included the now infamous Article XIII:

> Section 1. No negro or mulatto shall come into or settle in the State, after the adoption of this Constitution.
>
> Section 2. All contracts made with any Negro or Mulatto coming into the State, contrary to the provisions of the foregoing section, shall be void; and any person who shall employ such Negro or Mulatto, or otherwise encourage him to remain in the State, shall be fined in any sum not less than ten dollars, nor more than five hundred dollars.
>
> Section 3. All fines which may be collected for a violation of the provisions of this article, or of any law which may hereafter be passed for the purpose of carrying the same into execution, shall be set apart and appropriated for the colonization of such Negroes and Mulattoes, and their descendants, as may be in the State at the adoption of this Constitution, and may be willing to emigrate.
>
> Section 4. The General Assembly shall pass laws to carry out the provisions of this article.

Article XIII was voted on separately from the rest of the proposed constitution, and was overwhelmingly endorsed by Indiana voters. It received a higher percentage of votes than the constitution as a whole. Fortunately Article XIII did not remain law for long (see Smith v. Moody below).

Indiana cases continued

Freeman v. Robinson, 7 Ind. 321 (1855)

Freeman was a prosperous African-American businessman who had moved to Indianapolis from Georgia in 1844. Upon his arrival in Indianapolis, Freeman paid the appropriate bond as required under the 1831 statute and went to work. He acquired property, built a house, and opened a business downtown. In 1853 a Missouri slaveholder came to Indianapolis and alleged that Freeman was his runaway slave Sam.

Freeman was tricked into appearing before a federal judge and was later forced by U.S. marshal John Robinson to strip so he could be examined for marks to prove that he was indeed Sam. Despite the efforts of numerous prominent Indianapolis citizens, including Calvin Fletcher and Isaac Blackford, to post his bail, Freeman was held in jail while his lawyers traveled to Georgia and Canada to find witnesses for his defense. Freeman was charged three dollars a day while he was in jail.

The Court held that a free black man had the right to sue a federal marshal in state court for assault and battery that occurred during his arrest, as well as for extortion (that is, the marshal charging Freeman three dollars a day for his own upkeep). The Supreme Court held, "the assault and battery, and the extorting of money were no part of his official duty, under that or any other act, and were unlawful," implicitly agreeing that charging Freeman three dollars a day for his keep might fairly be called extortion.

Barkshire v. State, 7 Ind. 389 (1856)

While Freeman received considerable justice from the Indiana courts, not all blacks fared as well. This was most apparent in cases involving prosecutions for illegally bringing persons of color into the state. The appeal of one such conviction was pursued by Arthur Barkshire, who brought a black woman from Ohio to his home in Rising Sun, Indiana, and married her. He was prosecuted for the offense of bringing her to Indiana in defiance of Article XIII of the state constitution. He was found guilty and fined ten dollars. Barkshire's conviction was affirmed.

Smith v. Moody and Others, 26 Ind. 299 (1866)

The election of 1864 was a landslide for President Abraham Lincoln and Indiana governor Oliver P. Morton. They swept in along with them an entirely new Indiana Supreme Court : Jehu Elliott, James Frazier, Robert Gregory, and Charles Ray. Whether one thinks of them as Morton judges or Lincoln judges, these Republicans spoke about slavery with a completely different judicial voice. It was a voice that sounded much more like Blackford, Scott, and Holman then that of the judges who served on the Court from 1853-1864. One does not go too far in saying that the four of them declared unconstitutional a part of the Indiana constitution.

An Indianapolis resident named Smith, who was black, sued to recover on a promissory note given by a man named Moody, who was white. Moody's defense was that Smith was of African descent, that Smith had entered the state after the constitution. The Court ruled, with disdain:

> [N]ot only do they deprive them [blacks] of all the privileges and immunities secured to every citizen by the constitution, but they denounce severe punishment upon all such persons who many come into the State, regardless of their mechanical skills, intellectual ability, moral worth, or the services they may have rendered to the country. If persons of African descent are citizens of the United States, the legislation which denied to them every right of a citizen is void.

The Court had little doubt that persons of African descent were citizens of the United States.

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Discussion Guide

Suggested Points of Discussion:

1. Building on the provisions of the Northwest Ordinance of 1787, Indiana's 1816 Constitution prohibited slavery and indentured servitude. Despite this legal position, Indiana's population was not universally opposed to slavery; there were even rumors that a new constitutional convention might be called for the express purpose of removing this prohibition. The Indiana Supreme Court from 1816 to the mid 1830's worked valiantly, often against the tide of public sentiment, to uphold state constitutional prohibitions against slavery and involuntary servitude.

2. In 1842 in the case of Prigg v. Pennsyvlania, the U.S. Supreme Court attempted to minimize the States' efforts to protect fugitive slaves. This decision was followed in 1850 by stronger national fugitive slave legislation and in Indiana by a new provision in the 1851 Constitution expressly prohibiting the entrance of free blacks into Indiana. The interplay of the Prigg decision, the 1851 Indiana Constitution, and the Fugitive Slave Law of 1850 placed severe limitations on the Indiana Supreme Court's efforts to oppose slavery. It was in this obviously hostile environment toward blacks that John Freeman successfully conducted his four lawsuits.

3. The due process John Freeman received was extensive. With the aid of some of the most prominent lawyers of his time, Freeman was able to pursue four different legal actions, including one upheld by the Indiana Supreme Court. His court experiences were played out in the federal system, the county circuit court and the Indiana Supreme Court. One case was dismissed; in one he was awarded damages and the other two he lost on jurisdictional grounds. There was never any question, despite his race, that he was not entitled to use the courts or that his civil rights had been violated.

This discussion guide was prepared by Elizabeth R. Osborn, Special Assistant to the Chief Justice for Court History and Public Education. If you have any questions about this material, or ORAL ARGUMENTS ONLINE, feel free to contact her at (317) 233-8682 or eosborn@courts.state.in.us.

General Background Reading:

*Sandra Boyd Williams, *The Indiana Supreme Court and the Struggle Against Slavery,* 30 Ind. L. Rev. 305 (1997).

*Williams' article inspired David J. Remondini, Counsel to the Chief Justice, to initiate this project, and provides an excellent overview for all three of the suggested discussion points.

Minde C. Browning et al., *Biographical Sketches of Indiana Supreme Court* Justices, 30 Ind. L. Rev. 329, 333, 337, 349, (1997). Judges Davison, Gookins, Perkins, and Stuart were involved in the Freeman decision.

Suzann Weber Lupton, *Isaac Blackford: First Man of the Court,* 30 Ind. L. Rev. 319 (1997).

All three of the above articles are available on-line at the "Courts in the Classroom" website: www.state.in.us/judiciary/education/history.html.

Charles H. Money, *The Fugitive Slave Law of 1850 in Indiana*, 17 Indiana Magazine of History, 1921, at 159

Emma Lou Thornbrough, *Indiana and Fugitive Slave Legislation,* 50 Indiana Magazine of History, 1954, at 201.

Primary Source Documents:

Indiana Statutes:

1817 Ind. Laws ch. XXIV
1819 Ind. Laws ch. I
1819 Ind. Laws ch. VII
1824 Ind. Rev. Laws ch. XLVII
1831 Ind. Rev. Laws ch XXVI
1831 Ind. Rev. Laws ch LXVI
1838-39 Laws of a Local Nature ch. CCCII
1843 Ind. Rev. Stat. ch 53 §11
1852 Ind. Rev. Stat. ch 74
1853 Ind. Laws ch. 42

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Cases:

State v. Lasselle, 1 Blackf. 60 (1820)
In re Clark, 1 Blackf. 122 (1821)
Baptiste v. State, 5 Blackf.. 283 (1840)
Freeman v. Robinson, 7 Ind. 321 (1855)
Barkshire v. State, 7 Ind. 389 (1856)
Smith v. Moody and Others, 26 Ind. 299 (1866)

Prigg v. Pennsylvania, 41 U.S. 539 (1842)

Related Documents:

Northwest Ordinance of 1787
http://www.statelib.lib.in.us/www/ihb/resources/docnword.html

Indiana's Constitutions of 1816
: http://www.statelib.lib.in.us/www/ihb/resources/doconst1816.html

Indiana's Constitutions of 1851
http://www.statelib.lib.in.us/www/ihb/resources/1851doconst.html

Fugitive Slave Law of 1850
http://www.yale.edu/lawweb/avalon/fugitive.htm

John Freeman:

Timeline: Important Events in the Life of John Freeman
An Annotated Bibliography of Sources about John Freeman
http://www.in.gov/judiciary/education/special/freetown.html

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